policy, a limitation on the liability of partners has been generally looked upon with disfavor, *Imperial Co.* v. *Jewett* (1901) 169 N. Y. 143; *Hess* v. *Werts, supra,* but recognized if third parties choose to contract on such terms and an enforcible right remains. *Bank of Topeka* v. *Eaton* (1900) 100 Fed. 8. Since the Code provides no remedy not enforcible against the shareholders, *supra,* and the stipulation gives the shareholders immunity from suit, the position of the minority which gives effect to the primary intention to make a binding contract, seems sound, and it is more logical to base this position, as Werner, J., did, upon the ground that the stipulation was repugnant to the general tenor of the bond, than upon the broad ground of public policy.

VALUATION OF THE PROPERTY OF PUBLIC SERVICE COMPANIES.—When the property of a public service company is taken by a state or municipality under condemnation proceedings, *Matter of Brooklyn* (1894) 143 N. Y. 596, or under contract leaving the purchase price to be subsequently determined, *Matter of Water Com'rs* (N. Y. 1902) 71 App. Div. 544, the problem of ascertaining the fair and just compensation has proven to be most vexatious and one upon which the courts have shown no little divergence of opinion. Several theories, none of them exclusive, have been advanced: first, the original cost of the plant to the company; *Montgomery County* v. *Schuylkill Bridge Co.* (1885) 110 Pa. St. 64; *West Chester etc. Co.* v. *Chester County* (1897) 182 Pa. St. 40; second, the present cost of reproduction; *Brunswick etc. Water Dist.* v. *Maine Water Co.* (1904) 99 Me. 371, 382; *Matter of Water Com'rs, supra;* third, the capitalized value of its net income; *Nat'l Water Works Co.* v. *Kansas City* (1894) 62 Fed. 853; and fourth, the market value of its stock. *Mifflin Bridge Co.* v. *Juniata County* (1891) 144 Pa. St. 365; *Montgomery County* v. *Schuylkill Bridge Co., supra.* The first consideration—that of original cost—has received considerable attention from the courts. In order, however, for it to have any bearing upon present value, the extent of depreciation of the plant must be considered; *Kennebec Water Dist.* v. *Waterville* (1902) 97 Me. 185; moreover, there must be assurance that there were no fraudulent transactions and that the money was legitimately and wisely spent in the construction. *Brunswick etc. Water Dist.* v. *Maine Water Co., supra.* In the few cases in which original cost is considered to be the controlling element, the value of the franchise is added. *Montgomery County* v. *Schuylkill Bridge Co., supra; Clarion Turnpike Co.* v. *Clarion County* (1896) 172 Pa. St. 243; *West Chester etc. Co.* v. *Chester County, supra.* The objection to this test is that it may force the State to pay for an antiquated plant an amount greatly exceeding the cost of a modern and more efficient system. The second test—cost of reproduction—has received less consideration from the courts, seemingly on account of its severity; see, *Matter of Water Com'rs* (1903) 176 N. Y. 239, and in some cases has been entirely rejected. *Montgomery County* v. *Schuylkill Bridge Co., supra; Metropolitan Trust Co.* v. *H. & T. C. Ry. Co.* (1898) 90 Fed. 683. Value is thus determined in the competitive business field, but this rule is less applicable to public service callings because the capital can generally be less easily diverted

to other channels, and more especially because they are subject to regulation and supervision. Here, likewise, the franchise must be separately considered. See, *Nat'l Water Works Co.* v. *Kansas City, supra.* The third and fourth tests are very similar and both superficial, though sometimes considered. *Mifflin Bridge Co.* v. *Juniata County, supra.* Under these tests value depends upon the income received, which is governed by the rates charged. But since the rates which may lawfully be charged may only be a fair return upon the value of the property, it is begging the question to say that value then depends upon rates. See, *Brunswick etc. Water Dist.* v. *Maine Water Co., supra.* If the rates are assumed reasonable, the results reached by these methods will, of course, approximate the valuation upon which the rates are theoretically based. The fact that the plant is a "going concern" is universally conceded to be a proper subject for compensation. *Edinburg etc. Co.* v. *Edinburg* (1894) 71 L. T. Rep. 301; *Gloucester etc. Co.* v. *Gloucester* (1901) 179 Mass. 365, 383; *Newburyport etc. Co.* v. *Newburyport* (1897) 168 Mass. 541. Good will might well be considered if competition exists, but not if the company has a monopoly, for its customers have no choice. *Kennebec Water Dist.* v. *Waterville, supra.* For the most part, the courts have refused to confine themselves to any single test, but say that all must be taken into consideration. This amounts to a practical confession that they are helpless to formulate a rule to cover a difficult and intricate situation and is simply an attempt to reach an equitable result in each case. See, *Nat'l Water Works Co.* v. *Kansas City, supra; Brunswick etc. Water Dist.* v. *Maine Water Co., supra; Kennebec Water Dist.* v. *Waterville, supra.*

The question of valuation of the franchise is usually separately considered. That it is property, *West River Bridge Co.* v. *Dix* (1848) 6 How. 507, and may not be directly taken without compensation, is generally recognized, *Monongahela Navigation Co.* v. *United States* (1892) 148 U. S. 312; *People* v. *O'Brien* (1888) 111 N. Y. 1, though the same result can be indirectly reached by granting other franchises so that the resulting competition would be ruinous. *Charles River Bridge* v. *Warren Bridge* (Mass. 1837) 11 Pet. 420; *Syracuse Water Co.* v. *City of Syracuse* (1889) 116 N. Y. 167. In computing its value, consideration must be taken as to its character, whether it be exclusive or non-exclusive, *Brunswick etc. Water Dist.* v. *Maine Water Co., supra; Gloucester etc. Co.* v. *Gloucester, supra,* the length of time it is to run, *Kennebec Water Dist.* v. *Waterville, supra; Sunderland Bridge Case* (1877) 122 Mass. 459, 466, and whether or not it be subject to forfeiture. See *Kennebec Water Dist.* v. *Waterville, supra; Bridge Co.* v. *United States* (1881) 105 U. S. 470, 482. If but part of a franchise is condemned, compensation must be made to the extent to which it has been impaired. *United States* v. *Gettysburg Electric R. R.* (1896) 160 U. S. 668. Franchise valuation is generally measured with reference to rates which the company has charged, in order to compute what its revenue would probably have been during the unexpired period. *Sunderland Bridge Case, supra; Montgomery County* v. *Schuylkill Bridge Co., supra.* In a recent English case, a municipality entered into a contract to purchase a street railway when

it should be constructed. It was held that the price paid should be the value as a structure, including the element of a going concern, but excluding the franchise value. *Mayor etc. of Dudley* v. *Dudley etc. Ry. Co.* (1907) 97 L. T. Rep. 556. This result was reached upon the interpretation of the contract, but under the Tramways Act of 1870, similar results have been reached in the absence of contract, *Stockton etc. Water Board* v. *Kirkleatham Local Board* (1894) 69 L. T. Rep. 661; *Edinburg etc. Co.* v. *Edinburg, supra,* though in estimating value for the purpose of taxation, the franchise has been considered. *Pimlico etc. Co.* v. *Assessment Committee* (1874) 29 L. T. Rep. 605; *The King* v. *Lower Mitton* (1829) 9 B. & C. 810. This distinction is not illogical, for retaking without compensation would proceed on the ground that the franchise was granted gratuitously, taxation, on the ground of benefits received.

JURISDICTION OF COURTS OF BANKRUPTCY.—Under the Bankruptcy Act of 1898, as interpreted in *Bardes* v. *Hawarden Bank* (1900) 178 U. S. 524, the trustee could sue an adverse claimant in the Federal courts only with the latter's consent. The inconvenience experienced from thus placing the trustee at the mercy of the state courts led to the Amendment of 1903, which gave the Bankruptcy Court jurisdiction over suits to recover preferences, § 60b, and other fraudulent conveyances, etc., § 67e, given within the four months' period. § 70e gave the trustee power to avoid any transfer which any creditor might have avoided and to recover the same from any transferee except a *bona fide* holder for value, concluding with the same words as were used in §§ 60b and 67e: "For purpose of such recovery any court of Bankruptcy * * * and any State court which would have jurisdiction if bankruptcy proceedings had not intervened, shall have concurrent jurisdiction." § 23b has cast the meaning of this subdivision into grave doubt by its provision that the trustee shall only sue where the bankrupt would have been able to sue (except under §§ 60b or 70e) if bankruptcy proceedings had not intervened, unless the proposed defendant consents. One view is that § 70e must confer jurisdiction on the Bankruptcy Court whether the defendant consents or not, because any other construction would make § 70e of no effect, as jurisdiction probably existed anyway in case of consent, and because § 70e being a special provision, should override § 23b, a general one. *Hurley* v. *Devlin* (1906) 149 Fed. 268. The contrary view, supported by the weight of authority, *Skewis* v. *Barthwell* (1907) 152 Fed. 534; *Gregory* v. *Atkinson* (1904) 127 Fed. 183, rests on the fact that the Senate struck out § 70e from the exceptions to § 23b, and that the subject matter of § 70e (in marked contrast to §§ 60b and 67e) deals with transfers voidable under state law. The presence of § 70e is explained on the theory that Congress wished clearly to confer jurisdiction in case of consent.

Since suits by the trustee to recover property can only be brought under §§ 60b, 67e, and 70e, what constitutes an adverse claimant is now chiefly of importance in determining the summary jurisdiction of the Bankruptcy Court. No matter how complete a title an alleged claimant may assert against the trustee, the Bankruptcy Court may take jurisdiction preliminarily to see whether any basis for the claim, fraudulent or other-